

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS**

Charles R. Wood Oil Company, Inc.,

Plaintiff,

v.

Case No. 03-2206-JWL

GMAC Commercial Mortgage,

Defendant.

MEMORANDUM & ORDER

On May 2, 2003, defendant filed a motion to dismiss Count III of plaintiff's complaint (doc. #8). After plaintiff failed to respond to the motion in a timely fashion, the court, on May 30, 2003, directed plaintiff to show good cause why it failed to respond to defendant's motion to dismiss in a timely fashion and further directed plaintiff to file its response to defendant's motion to dismiss on or before June 13, 2003. Plaintiff has now filed its response to the court's show cause order and, in its response, expressly states that it does not oppose defendant's motion and that it consents to the dismissal without prejudice of Count III of plaintiff's complaint. In reply, defendant reiterates its position that Count III be dismissed with prejudice as it cannot be maintained under Kansas law in any event.

Count III of plaintiff's complaint is entitled, "Breach of the Covenant of Good Faith and Misrepresentation." While the nature of this claim is not entirely clear, to the extent plaintiff, as defendant suggests, purports to state a claim for tortious breach of the covenant of good faith and fair dealing, that claim is dismissed with prejudice as Kansas does not recognize such a claim. *See Horizon Holdings, LLC v. Genmar Holdings, Inc.*, 241 F. Supp. 2d 1123, 1148 (D. Kan. 2002).

To the extent plaintiff is asserting a contract-based claim for breach of the covenant of good faith and fair dealing, the claim is dismissed without prejudice. To the extent plaintiff purports to assert in Count III a claim of fraud or negligent misrepresentation based on alleged misrepresentations that are essentially terms of the contract itself, that claim is dismissed with prejudice. *See Atchison Casting Corp. v. Dofasco, Inc.*, 889 F. Supp. 1445, 1461 (D. Kan. 1995) (Kansas law precludes a misrepresentation cause of action when the alleged misrepresentations are essentially terms of the contract itself.). Finally, to the extent plaintiff asserts in Count III a misrepresentation claim based on alleged misrepresentations separate and distinct from the terms of the contract, that claim is dismissed without prejudice.

IT IS SO ORDERED.

Dated this 2nd day of July, 2003, at Kansas City, Kansas.

s/ John W. Lungstrum

John W. Lungstrum

United States District Judge